Supreme Court, U.S.
FILED
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No.

In The
Supreme Court of the United States

JOSUE ANAYA AND MARY ANAYA,
HUSBAND AND WIFE
AS PARENTS OF ROSA ARIEL ANAYA,
A MINOR CHILD,

Petitioner,

v.

DOUGLAS COUNTY, NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEBRASKA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court in Employment Div. vs. Smith, 494 U.S. 872 (1990), create a hybrid claim exception whereby if a litigant's Free Exercise claim is combined with another Constitutional claim, then strict scrutiny would be the appropriate standard of review?

2. Is strict scrutiny the appropriate standard to apply when such state action burdens a party's First Amendment right to freely exercise his religion along with another Constitutional right such as a right of parents to direct the upbringing of their children?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Questions for Review ii

List of Parties iii

Table of Cited Authorities iv

Citations of the Official Order entered in the Case 1

Jurisdiction 2

Statement of the Case 3

Reasons for Granting Writ 4

Appendices A, B, C

TABLE OF CITED AUTHORITIES

CASES:

Employment Div. vs. Smith, 494 U.S. 872 (1990).....ii, 4

Cornerstone Bible Church vs. City of Hastings, 948 F.2d 464 (8th Cir. 1991)...5

Kissinger vs. Board of Trustees, 5 F.3d 177 (6th Cir. 1993).....5

Miller vs. Reed, 176 F.3d 1202 (9th Cir. 1999).....5

Swanson vs. Guthrie, 135 F.3d 694 (10th Cir. 1998).....5

CONSTITUTIONAL PROVISIONS:

U. S. Const., Amendment I..... 2

STATUTES:

Neb. Rev. Stat. §71-519..... 2,3,4

28 U.S.C. §1257(a)..... 2

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JOSUE AND MARY ANAYA, HUSBAND AND WIFE, AS PARENTS OF ROSA ARIEL ANAYA, A MINOR CHILD,

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PETITION FOR WRIT OF CERTIORARI TO THE NEBRASKA SUPREME COURT

The Petitioners, Josue and Mary Anaya, respectfully request that a writ of certiorari issue to review the judgment of the Nebraska Supreme Court entered on the 25th day of March, 2005.

OPINION BELOW

The opinion of the Nebraska Supreme Court appears in Appendix A to the petition and is reported at 269 Neb.552 (2005), not yet reported in the Northwest Reporter.

The opinion of the Douglas County District Court of Nebraska appears in Appendix B to the petition and is not published.

A copy of Neb. Rev. Stat. §71-519 appears in Appendix C.

JURISDICTION

On or about March 25, 2005, the opinion and order of the Nebraska Supreme Court, the highest state court in the State of Nebraska, affirmed the Douglas County District Court's order compelling Mr. and Mrs. Anaya to submit their infant daughter to a blood-screening test pursuant to Neb. Rev. Stat. §71-519. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. Constitution Amendment I.

Neb. Rev. Stat. §71-519(1), states in pertinent part, "All infants born in the State of Nebraska shall be screened for phenylketonuria, primary hypothyroidism, biotindase, deficiency, and such other metabolic diseases as the Department of Health and Human Services may from time to time specify. Confirmatory tests shall be performed if a presumptive positive result on the screening test is obtained."

STATEMENT OF THE CASE

Josue and Mary Anaya are the parents of eight children. Their eighth child was born on July 11, 2003 in their home and outside the presence of a physician. Mr. and Mrs. Anaya reported the birth of their child on or about July 17, 2003. On or about August 25, 2003, Mr. and Mrs. Anaya received a telephone call and a letter from the Department of Health and Human Services demanding that they submit their child born on July 11, 2003 to a blood test to screen for metabolic diseases pursuant to Neb. Rev. Stat.§71-519. Mr. and Mrs. Anaya did not allow their child to be submitted to the metabolic screening test because of their sincerely held religious belief that life is in the blood and therefore blood should not be taken from the body.

On or about September 25, 2005, Douglas County brought an action against Mr. and Mrs. Anaya in the Douglas County District Court to compel them to submit their child to the metabolic screening test as per Neb. Rev. Stat.§71-519. Mr. and Mrs. Anaya answered said action and raised their right to freely exercise their religion as guaranteed by the United States Constitution, and their right as parents to direct the upbringing of their children.

The District Court of Douglas County Nebraska held that "the parent's religious belief does not outweigh the state's compelling interest that these children can grow and develop to be free of metabolic disease particularly in light of the minimal invasion of the blood test administration which is merely a pinprick to the child's heel." (District Court order page 6). The case was timely appealed to the Nebraska Court of Appeals and a Motion to By Pass to the Nebraska Supreme Court was granted.

The Nebraska Supreme Court affirmed the Douglas County District Court's order compelling Mr. and Mrs.

Anaya to submit their child to a metabolic screening test. The Nebraska Supreme Court held, "we do not read *Smith* (referring to Employment Div. vs. Smith, 494 U.S. 872 (1990)) as supporting the Anayas' claim concerning strict scrutiny. Although *Smith* discussed prior decisions that involved not only the Free Exercise Clause but other constitutional provisions, the Court did not hold that strict scrutiny is required simply because more than one constitutional right might be implicated." The Court further held, "we conclude that the Anayas' assertion of a hybrid rights claim does not implicate a strict scrutiny review of Neb. Rev. Stat. §71-519. A party may not force the government to meet the strict scrutiny standard by merely asserting claims of violations of more than one constitutional right."

REASONS FOR GRANTING WRIT

The question presented is whether the strict scrutiny test is applied when a state action burdens the free exercise of religion as guaranteed to the Petitioners under the First Amendment of the United States Constitution combined with another constitutional claim. In Employment Div. vs. Smith, 494 U.S. 872 (1990), the Court indicated that strict scrutiny was applied when a case presented a hybrid claim, i.e. a Free Exercise claim connected with another constitutional claim such as the rights of parents or free speech claim. The United States Courts of Appeals have had occasion to address the issue of hybrid claims in the context of the Free Exercise clause, and there is a conflict as to whether a hybrid claim warrants the application of strict scrutiny test.

Some Courts have acknowledged the hybrid claim warrants the strict scrutiny test when a Free Exercise claim is combined with other constitutional rights violations.

Swanson vs. Guthrie, 135 F.3d 694 (10th Cir. 1998)[1]; Miller vs. Reed, 176 F.3d 1202 (9th Cir. 1999) Cornerstone Bible Church vs. City of Hastings, 948 F.2d 464 (8th Cir. 1991).[2] Other courts, however, have rejected the notion that a hybrid claim warrants the application of strict scrutiny. Kissinger vs. Board of Trustees, 5 F.3d 177 (6th Cir. 1993).

The question of whether the strict scrutiny test would be the appropriate standard of review if a Free Exercise claim is combined with other Constitutional claims has been treated inconsistently in the United States Court of Appeals, leaving an inconsistent precedent for U.S. District Courts and state courts to follow.

As per Rule 10 (b) of the United States Supreme Court Rules, the Petitioners request a writ of certiorari because the state court of last resort in the present case, the Nebraska Supreme Court, has held that a hybrid claim does not trigger the strict scrutiny standard of review, and thus rationale basis is the appropriate standard of review. There is inconsistent precedent in the United States Court of Appeals regarding whether hybrid claims warrant the application of strict scrutiny.

WHEREFORE, for the reasons stated herein, the Petitioner respectfully requests an order granting their Petition for Writ of Certiorari.

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[1] The Court in Swanson noted that the *Smith* opinion does not make it clear whether it is constitutionally sufficient for a law or policy to be neutral and of general applicability, or whether the law or policy will still have to satisfy some lesser standard than the compelling interest test.

[2] The United States District Court for the District of Nebraska rejected the Petitioners assertion of a hybrid claim and the Court of Appeals remanded the case with directions of the Court of Appeals to consider the hybrid claim.

JOSUE and MARY ANAYA,

Petitioner,

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s/ Gary F. Wence, 17519
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OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

DOUGLAS COUNTY, NEBRASKA, APPELLEE,
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Case Caption

DOUGLAS CTY. V. ANAYA

Filed March 25, 2005. No. S-03-1446

Appeal from the District Court for Douglas County: Patricia A. Lamberty, Judge. Affirmed.

Amy L. Mattern, of Whitner Law Firm, P.C., L.L.O., for appellants.

Stuart J. Dornan, Douglas County Attorney, Brent Bloom, and Megan Hottman, Senior Certified Law Student, for appellee.

Amy A. Miller for amici curiae American Civil Liberties Union Foundation of Nebraska and Louise and Ray Spiering.

Patrick J. Phipps, of Metcalf, Thompson & Phipps, for amici curiae Children's Healthcare Is a Legal Duty et al.